DATE ISSUED: August 1, 1996

CASE NO. 94-INA-518,

In the Matter of:

LORRI GUSKY,
Employer,

on behalf of

ROSINA ASARE,
Alien.

Appearance: Robert M. Price, Esq.
Washington, DC
For the Employer and the Alien

Before: Huddleston, Vittone and Wood, Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of the Alien, Rosina Asare (hereafter "Alien"), filed by Employer, Lorri Gusky (hereafter "Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A)(the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, PA, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ aliens on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing wage conditions through the public employment service

and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied the application for certification and the employer's request for review, as contained in the appeal file ("AF"), as well as any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 24, 1994, as amended, the Employer filed an application for labor certification to enable the Alien, a national of Ghana, to fill the position of "Cook" in a Private Home for a 40 hour workweek, with a work schedule from 10:00 a.m. to 6:00 p.m. with varying overtime. (AF 18). The job duties for the position in question, as described by the Employer, are as follows:

> Plans menus and cooks meals, in private home, according to recipe or tastes of employer; Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May specialize in preparing and serving dinner for employer.

Experience required was two years in the job offered. Special requirements were "[g]ood hygiene, employer checks references." (AF 18). The application form indicated the Alien had been employed as a Cook for a different employer, an Indian national, from January until October 1987 in Ghana and from October 1987 until July 1988 and from April 1993 until the present in Washington, DC; she also worked for another employer as a cook in Bethesda, Maryland, from July 1988 to March 1993. (AF 20-24).

In a Notice of Findings ("NOF") dated July 28, 1993, the CO proposed to deny certification because the Employer did not comply with the regulations appearing at 20 C.F.R. Part 656. Specifically, the CO found it was questionable whether the duties described were full-time work within the context of the Employer's household and the CO advised the Employer that she must establish that the job offer meets the requirement of "full-time work" under the definition of "employment" in the regulations (20 C.F.R. § 656.3) by providing evidence which shows that the duties described clearly constitute full-time employment. Additional information was requested concerning such matters as the number of meals prepared daily and weekly, the frequency of entertaining, the other duties the Alien would be expected to perform, whether there were any children in the household, and who would care for the children (if any). (AF 13-15).

The Employer's rebuttal to the Notice of Findings consisted of a letter from her attorney responding to the specific

questions raised. The attorney advised that the Employer and her husband are sales representatives who work erratic hours and meet clients outside the home, that she is away from the house from 7:00 to 10:00 a.m. and from 4:00 p.m. to 7:00 p.m. while her husband is away from 10:00 a.m. to 4:00 p.m., that they have a 21-month-old child they take care of themselves (with occasional help from relatives), and that they also have a cleaning lady who works once a week. With respect to the Alien's schedule five days per week, she was to spend one hour daily preparing breakfast for four people and one half hour cleaning up, one hour daily preparing lunch for two people and one half hour cleaning up, and four hours daily preparing dinner for four people and one and one half hours cleaning up; she was to spend an additional eight to ten hours weekly cleaning the kitchen appliances, shelving the groceries, and planning the menus. Also provided was an entertainment schedule reflecting several gatherings monthly with from 2 to 55 people present. (AF 7-10).

The CO found the rebuttal unpersuasive regarding the above-referred deficiency and issued a Final Determination on June 3, 1994, denying certification. The CO noted apparent inconsistencies in the information provided and determined that "though the employer has shown a need for a cook, the employer has not credibly shown that the job opportunity is of a full time nature solely based on cooking responsibilities." (AF 4-6).

On or about July 12, 1994, the Employer, through counsel, requested review of the CO's denial by this Board of Alien Labor Certification Appeals ("Board") and provided additional information and argument. (AF 1). Another copy of the request for review was provided as the Employer's statement of position.

DISCUSSION

We agree with the CO that the application fails on the basis listed by the CO: failure to establish the existence of a full-time position as "Cook" (as required by 20 C.F.R. § 656.3). Quite simply, the Employers have failed to demonstrate that a full-time cooking position is involved. ***See generally Dr. Marta de Pierris,*** 93-INA-525 (Sept. 15, 1994).

Section 656.3 (formerly section 656.50) of title 20, Code of Federal Regulations defines "employment" as permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. ***Mr. and Mrs. Stanley Tee,*** 94-INA-10 (June 27, 1995), ***citing Gerata Systems, Inc.,*** 88-INA-344 (Dec. 16, 1988) (***en banc***). Where an employer fails to demonstrate the volume of work necessary to support a full-time employee, it fails to establish full-time employment. ***Mr. and Mrs. Stanley Tee, supra; Tousi Rugs,*** 92-INA-374 (Sept. 29, 1993).

In the instant case, the CO carefully considered the information submitted on behalf of the Employer, but noted some apparent inconsistencies:

> Though the employer presented a detailed account of the amount of hours necessary to prepare the various meals of the day, the hours involved do not correspond with the schedules noted or the amount of people indicated. The employer indicated breakfast for four people, yet one of the adults (male employer) is not present at the time breakfast is being prepared, because according to the employer's statement that individual leaves the house at the time the alien is arriving (10:00 am). The employer has also indicated that 4 people are served during that meal, yet only two adults have been noted and a small child. One can only come to the conclusion that the employer is including the alien, and this is not acceptable. Breakfast is apparently being prepared for one adult and one child.
>
> The same is apparent for the dinner meal. The female employer is not present according to the schedule until after the alien has left for the day at 6:00 pm, therefore the dinner preparation is for one adult (male) and one child. It is difficult to believe that it would require 4 hours per day, 5 days per week to prepare a dinner meal that is being consumed by 2 adults and a child of less than two years.

(AF 5-6). The CO also found the Employer's assertion that although she and her husband need a full-time cook, they do not need a child care worker, to be not credible, given their employment at in-home offices, and she questioned whether either one could conduct a normal business day while assuming sole responsibility for care of the minor child. Notwithstanding the erratic schedules and the entertainment needs of the household, the CO questioned whether there were grounds for full-time employment as a cook, and we agree.

We note that the attorney has indicated additional information as to the needs of the Employer's household in the Employer's request for review. (AF 1-3). However, we cannot consider this additional information in making our determination, except to the extent that it may be deemed to represent the Employer's statement of position or legal brief. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). ***See also*** 20 C.F.R. § 656.26(b)(4). Here, the Employer has failed to assert a basis for not having submitted the subject information as part of the rebuttal and it should not be considered now. ***See Sharp Screen Supply, Inc.,*** 94-INA-214 (May 25, 1995); ***ST Systems, Inc.,***

92-INA-279 (Sept. 2, 1993); ***Schroeder Brothers Co.,*** 91-INA-324 (Aug. 26, 1992); ***Kem Medical Products Corp.,*** 91-INA-196 (June 30, 1992). In addition, the statements by an attorney are not evidence, even though the CO accepted rebuttal under the signature of the Employer's attorney. Assertions by an employer's attorney that are not supported by the underlying statements of a person with personal knowledge of the facts do not constitute evidence. ***Moda Linea, Inc.,*** 90-INA-424 (Dec. 11, 1991); ***Mr. & Mrs. Elias Ruiz,*** 90-INA-425 (Dec. 9, 1991).

In view of the above, the Employer has failed to satisfy her burden of establishing the need for a full-time cook and the application must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

For the Panel:

PAMELA L. WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten (10) days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Lorri Gusky (Rosina Asare, alien)

Case No. : 94-INA-518

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: